



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nova International, Inc.

File: B-227696

Date: September 21, 1987

DIGEST

1. The specific financial qualifications to be considered in determining a prospective contractor's responsibility are within the contracting officer's discretion and business judgment.
2. A procuring agency is not required to delay award indefinitely while an offeror attempts to cure the causes for the firm being found nonresponsible and, where a preaward survey found that an offeror's annual sales were substantially less than the projected award amount, the contracting officer acted reasonably in finding the offeror nonresponsible because it failed to submit a performance bond, irrevocable letter of credit or other evidence of adequate financing.
3. Contracting officer's insistence that offeror communicate with her rather than with members of preaward survey activity, none of whom have authority to bind the government contractually, was not unreasonable.

DECISION

Nova International Corporation protests its disqualification as nonresponsible under Group III of request for proposals (RFP) No. FNP-A7-1901-N-1-28-86, for the purchase of rattan bedroom furniture, issued by the General Services Administration (GSA), Federal Supply Service Furniture Commodity Center. Nova contends that it has clearly demonstrated its ability to provide the financing needed to perform the contract and that GSA's finding that Nova was financially nonresponsible was arbitrary and capricious.

We deny the protest.

On November 22, 1985, GSA issued the above solicitation for procurement of four separate groups of furniture designated groups I (living room), II (dining room), III (bedroom) and IV (occasional tables). The solicitation provided for award

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to be made in the aggregate by group either F.O.B. destination or F.O.B. origin on the basis of lowest evaluated cost at delivery, with proposals due by January 28, 1986. Best and final offers (BAFOs) were submitted on June 11, 1986.

On September 26, 1986, GSA awarded a contract for Groups I, II, and IV to Shelby Williams Industries, Inc., and on October 27, 1986, issued an amendment revising the delivery schedule and reopening discussions on Group III. The second round of BAFOs submitted on November 14, 1986. BAFOs indicated the low offeror to be the Jewett Cameron Lumber Corporation (JCL), with Nova as second low offeror. GSA conducted simultaneous preaward surveys of JCL and Nova. GSA's Credit and Finance Section, located in Kansas City, Missouri, reviewed the financial data submitted and recommended that no award be made to Nova in view of the firm's inadequate financial resources. Specifically, the survey indicated that Nova's working capital was weak, its retained earnings showed a deficit, it had past due accounts and it was noted that a potential \$2.8 million contract would represent more than two and a half times Nova's prior fiscal year sales. JCL was also found nonresponsible and its offer was rejected. JCL protested to our Office.

While JCL's protest was being resolved, Nova sought an opportunity to obtain an appropriate financial backer. The contracting officer had several discussions with Nova and the Credit and Finance Center concerning means by which Nova could demonstrate financial responsibility. At various times, Nova offered to provide a 30-percent performance bond, a bank letter of credit or a corporate guaranty from Pirvest, Inc., a company connected with both Pier One Imports, Inc., and the Tandy Corporation. Pirvest submitted a corporate resolution committing itself to provide financing through a bank letter of credit to enable Nova to purchase furniture from its supplier.

Nevertheless, the contracting officer, advised by the GSA Credit and Finance Section, retained doubts about the backer's ultimate responsibility and insisted upon measures to protect the government's interest in the event that Nova failed to perform. When on April 2, 1987, this Office issued its opinion dismissing JCL's protest Jewett-Cameron Lumber Corp., B-223779.2, Apr. 24, 1987, 87-1 CPD ¶ 433, and leaving Nova as the low offeror, the contracting officer moved to resolve once and for all the issues relating to Nova's financial capability.

After a meeting with Nova on June 17, 1987, in which Nova attempted again to demonstrate its financial responsibility, the contracting officer advised Nova by letter of June 24, 1987, that Nova would have until July 1 to provide an

irrevocable letter of credit covering excess reprocurment costs or a 30-percent performance bond. Nova provided neither, and on July 8, 1987, the contracting officer notified Nova that its offer would no longer be considered for award.

Nova challenges the nonresponsibility determination on several grounds. First, Nova believes that, contrary to the contracting officer's finding, Nova demonstrated the ability to obtain financing as required by the Federal Acquisition Regulation (FAR). Secondly, Nova feels that the requirement for a 30-percent performance bond was arbitrarily applied since it did not appear in the solicitation nor was such a bond required of any other offeror. Third, Nova believes that it should have been allowed to present evidence directly to GSA's Credit and Finance Division demonstrating its financial capability. Fourth, Nova asserts that the contracting officer imposed financial barriers, specifically the requirement for 100 percent financing, that are beyond the scope of normal commercial transactions.

The term "responsibility" relates to a potential contractor's ability to meet certain general standards set forth in FAR, 48 C.F.R. § 9.104-1 (1986), as well as any special standards set forth in the solicitation. No contract award may be made unless the contracting officer makes an affirmative determination of a contractor's responsibility and absent clear evidence of responsibility, the contracting officer must determine the contractor to be nonresponsible. To demonstrate financial responsibility, a prospective contractor must show that it has or can obtain financial resources adequate to perform the contract. FAR 48 C.F.R. § 9.104-1(a) (1986). Ordinarily the contracting officer must refer a determination that a small business such as Nova is nonresponsible to the cognizant Small Business Administration (SBA) regional office for a determination of competency, but in this case, the SBA has declined jurisdiction in accordance with its policy that a certificate of competency will not be considered for a nonmanufacturer which is not supplying a domestic product. See 13 C.F.R. § 125.5(b)-(c). Therefore, it is appropriate for our Office to consider the responsibility matter.

In making a determination regarding responsibility, the contracting officer is vested with a wide degree of discretion and business judgment. Generally we do not question the exercise of that discretion and judgment absent bad faith or the lack of any reasonable basis for the determination. Manufacturing Systems International, Inc., B-212173, May 30, 1984, 84-1 CPD ¶ 586.

of default by Nova. However, the contracting officer was concerned over the lack of any formal business relationship between Pirvest and Nova. In addition, it appears that Pirvest's bank was refusing to issue any letter of credit without corporate and personal guaranties from Pirvest. Under the circumstances, we cannot say that the contracting officer's concern as to this financial arrangement was unreasonable; the specific financial qualifications to be considered in determining responsibility are within the contracting officer's discretion and business judgment. Manufacturing Systems International, Inc., B-212173, supra.

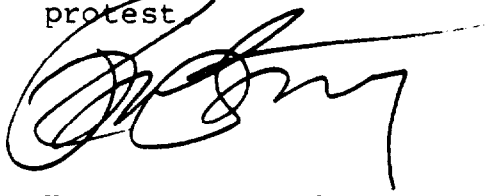
With regard to the performance bond, it is clear that the contracting officer gave Nova the option of providing such a bond or providing an irrevocable letter of credit. Nova was unable or unwilling to provide either by the contracting officer's deadline, nor did Nova offer any alternative method of assuring its financial capability. While the contracting officer is expected to update information on responsibility-related factors to insure that decisions are based on the most current information available, an agency need not delay award indefinitely while an offeror attempts to cure the factors leading to a determination of nonresponsibility. Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48; ICR, Inc.--Request for Reconsideration, B-223033.2, Nov. 4, 1986, 86-2 CPD ¶ 516.

The agency report evidences that there was some confusion between the contracting officer and the Credit and Finance Division in determining what arrangements might protect the government and in explaining GSA's position to Nova. Nevertheless, the Credit and Finance Division, in commenting on the protest, correctly points out that it serves in a purely advisory role to the contracting officer and would have no authority to bind the government on the question of a firm's responsibility, even if they were convinced of Nova's financial responsibility. We cannot say that the refusal of officials of that office to meet with Nova directly was unreasonable, nor was the contracting officer's refusal to arrange such a meeting an abuse of her discretion.

Nova asserts that GSA imposed unreasonable financial barriers to award, specifically a requirement for 100 percent financing, beyond the scope of normal project financing. Even assuming the latter statement to be true, we would not necessarily find that the contracting officer abused her discretion. As pointed out above, the instant contract would have more than tripled Nova's annual sales; the record indicates that Nova never provided sufficient evidence that it had or could obtain financial resources

sufficient to protect the government's interest. The instant contract was not a "normal" project for Nova, nor, in our view, did the contracting officer abuse her discretion by insisting upon extra security to protect the government's interest.

Since we find that Nova did not satisfy the contracting officer as to its financial capability, the contracting officer properly found Nova nonresponsible, and we deny the protest.



Harry R. Van Cleve
General Counsel

